FILED BY CLERK
APR -8 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE TYLER A.	)	2 CA-JV 2009-0132 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. JV14889501

Honorable Kathleen Quigley, Judge Pro Tempore

AFFIRMED

Barbara LaWall, Pima County Attorney
By James M. Coughlin
Tucson
Attorneys for State

Robert J. Hirsh, Pima County Public Defender
By Julie M. Levitt-Guren
Tucson
Attorneys for Minor

E C K E R S T R O M, Presiding Judge.

¶1 After a contested adjudication hearing in September and October 2009, the juvenile court found seventeen-year-old Tyler A. had committed the offense of criminal damage, a class six felony, and that he was a delinquent minor. *See* 1996 Ariz. Sess.

Laws, ch. 361, § 2 (former A.R.S. § 13-1602(A)(1), (B)(3), applicable at time of Tyler's offense). At a November 2009 disposition hearing, the court placed Tyler on juvenile intensive probation until his eighteenth birthday and ordered him to pay restitution in the amount of $1,457.49. On appeal, Tyler argues the evidence was insufficient to find him delinquent, because the "State's sole evidence that tied Tyler to the crime was a police officer's hearsay testimony" of his culpability, and because the juvenile court improperly permitted the state to use the officer's impeachment testimony as substantive evidence. We affirm.

¶2 When reviewing claims of evidentiary insufficiency, "we will not re-weigh the evidence, and we will only reverse on the grounds of insufficient evidence if there is a complete absence of probative facts to support the judgment or if the judgment is contrary to any substantial evidence." *In re John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d 772, 774 (App. 2001). "[W]e view the evidence in the light most favorable to sustaining the adjudication." *Id*. We review decisions regarding the admissibility of evidence for an abuse of discretion. *State v. Sucharew*, 205 Ariz. 16, ¶ 19, 66 P.3d 59, 66 (App. 2003).

¶3 To establish that Tyler committed criminal damage the state was required to prove that he recklessly had defaced or damaged the property of another person. *See* 1996 Ariz. Sess. Laws, ch. 361, § 2 (former A.R.S. § 13-1602(A)(1)). The evidence here established that the victim, J., a shift manager at a McDonald's restaurant in Green Valley, had suspended Tyler for three days in March 2009, after he had refused to clean the light fixtures. At about 6:00 a.m., two days after he had been suspended, but before he was permitted to return to work, Tyler and his childhood friend, P., appeared at the

drive-through portion of the restaurant. They entered the restaurant at 8:00 a.m. and took pictures of J. and of the ladder Tyler had been instructed to use to clean the lights. Tyler and P. returned to the McDonald's again around 10:00 a.m. and spoke with J.'s supervisor, Galacion. Tyler explained to Galacion that he did not feel safe using the ladder, and despite Galacion's assurances that he would not be required to use it in the future, Tyler quit his job.

¶4 Approximately three hours after his meeting with Tyler, Galacion noticed that J.'s car, a 2007 Hummer parked in the McDonald's lot, had two flat tires. Galacion testified that the tires had looked fine when he had last seen the vehicle during his meeting with Tyler that morning. A Pima County Sheriff's Department volunteer who had investigated the matter testified that the tires on J.'s vehicle were flat as a result of having been punctured with a sharp instrument and that there were "white streaks coming down from the filler cap on the gas tank" that tasted sweet. The volunteer and Galacion testified they were unaware of any previous vandalism having occurred in the parking lot at the shopping center where the McDonald's is located. Royal Hummer repaired the two tires, cleaned out the fuel tank, and removed "sugar" from the fuel filter.

¶5 A few weeks after the incident occurred, P. was interviewed by Detective Raymond Almaraz and told Almaraz Tyler had confessed. At the adjudication hearing, the state called P. to testify. Although P. recalled having been interviewed by Almaraz, he could not remember anything he had told the detective, and he denied having told him anything about Tyler's involvement in the matter. The transcript of the interview, during which P. had told Almaraz that Tyler had confessed to damaging J.'s vehicle, was not

admitted as an exhibit at the adjudication hearing. On cross-examination, P. testified that, if Almaraz were to testify that P. had spoken with Tyler about Tyler's involvement in the incident, the officer probably had "misunderstood" him.

¶6 The state then called Almaraz as a witness. Without objection from defense counsel, he testified about his interview with P. Almaraz explained that, although P. initially had denied knowing whether Tyler had damaged J.'s vehicle, he ultimately had told Almaraz that Tyler had told him "everything" a week after the incident. P. provided a detailed description of how Tyler had "punch[ed] out" the tires on the driver's side of J.'s vehicle with a screwdriver and had mixed sugar and water in a plastic bag, then poured the mixture into the gas tank. Defense counsel then cross-examined Almaraz.

¶7 After the state rested, defense counsel moved for a directed verdict, arguing that the only evidence of Tyler's guilt was the statements P. had made during the interview, which were inconsistent with P.'s testimony at trial. The court denied the motion. At the conclusion of the hearing, the court found:

> I have considered the testimony given over this [sic] two days of trial. I have considered the credibility of the witnesses and their manner while testifying.
>
> Frankly, I think the case comes down to P[.]'s testimony in this matter; I agree with [defense counsel] on that. And I believe P[.] was trying to protect his friend initially, when the detective came to speak to him, and then he had very specific detail[s] about what had occurred. And then he came into court still wishing to protect his friend, saying that the detective mistook what he said at the time and—but the details P[.] gave the detective were pretty specific regarding the screwdriver, regarding the baggy of sugar with water in it, and what had occurred.

> Ther[e]fore, based on all the testimony that I considered and evaluated, I do find that the State has proven beyond a reasonable doubt . . . criminal damage . . . .

¶8 To the extent Tyler argues on appeal that Almaraz's testimony was hearsay, we reject that argument.[1] A prior inconsistent statement by a witness who is subject to cross-examination at trial concerning the statement is not hearsay. Rule 801(d)(1)(A), Ariz. R. Evid. Accordingly, because P.'s in-court testimony, which was subject to cross-examination, was inconsistent with the statements he had made to Almaraz during the interview, Almaraz's testimony regarding those statements was admissible as non-hearsay. In addition, the trier of fact may consider prior inconsistent statements as substantive evidence, and not solely for impeachment purposes. *State v. Skinner*, 110 Ariz. 135, 142, 515 P.2d 880, 887 (1973).

¶9 However, pursuant to *State v. Allred*, 134 Ariz. 274, 277, 655 P.2d 1326, 1329 (1982), we must consider whether the admission of Almaraz's impeaching testimony as substantive evidence of Tyler's guilt was unduly prejudicial. In *Allred*, our supreme court set forth five factors to consider in making this assessment: (1) whether the witness being impeached denies making the impeaching statement; (2) whether the witness presenting the impeaching statement has an interest in the proceeding, and there

[1]Because Tyler did not raise a hearsay objection during Almaraz's testimony on the basis upon which he now seeks appellate review, that the juvenile court improperly considered Almaraz's testimony about Tyler's confession to P. as substantive evidence, we review only for fundamental error. Fundamental error requires the defendant establish both that fundamental error occurred and that the error resulted in prejudice. *State v. Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d 601, 608 (2005). For the reasons set forth in this decision, Tyler has not sustained his burden of showing that fundamental error occurred.

is no other corroboration of the statement having been made; (3) whether there are other factors affecting the reliability of the impeaching witness; (4) whether the statement is intended for substantive rather than impeachment purposes; and (5) whether the impeachment testimony is the only evidence of guilt. *Id*. The *Allred* factors "are not to be applied mechanistically," but instead analyzed on a case-by-case basis. *State v. Miller*, 187 Ariz. 254, 259, 928 P.2d 678, 683 (App. 1996). Further, our analysis is not limited to the factors set forth in *Allred*. *Allred*, 134 Ariz. at 277, 655 P.2d at 1329.

¶10 First, although P. did not deny that the interview with Almaraz took place, he denied having implicated Tyler during the interview and repeatedly testified he could not remember what he had told Almaraz. Although the state suggests P.'s having testified he did not "remember" was not a denial of his having made incriminating statements about Tyler, a careful reading of his testimony shows that he did, in fact, deny having made the statements. We note, however, that the trial court "has considerable discretion in determining whether a witness's evasive answers or lack of recollection may be considered inconsistent with that witness's prior out-of-court statements." *Salazar*, 216 Ariz. 316, ¶ 15, 166 P. 3d at 110; *e.g.*, *State v. King*, 180 Ariz. 268, 275, 883 P.2d 1024, 1031 (1994) (no abuse of discretion in admission of out-of-court statement based on court's belief witness feigned inability to remember at trial). As the finder of fact here, the juvenile court's credibility determinations were especially important in light of the conflicting nature of the testimony. *See In re Maricopa County Juv. Action No. JS-8490*, 179 Ariz. 102, 107, 876 P.2d 1137, 1142 (1994). The court's adjudication of guilt

depended on its assessment of each witness's credibility, which we will not re-weigh on review. *John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d at 774.

¶11 Second, the individual presenting the impeaching statements, Almaraz, did not have an interest in the outcome of the proceeding. *See Miller*, 187 Ariz. at 258, 928 P.2d at 682 ("A police officer is not per se 'interested' merely by virtue of his or her involvement in a criminal investigation, absent evidence of some personal connection with the participants or personal stake in the case's outcome."). The record contains no evidence that Almaraz had any personal interest in the outcome of this case.

¶12 Third, there was no suggestion that Almaraz's testimony was unreliable for any reason, including age or mental capacity.[2] Moreover, Almaraz had conducted his interview with P. only a few weeks after the incident had occurred, he had reviewed the detailed report summarizing the interview before testifying, and he did not find it necessary to refer to the transcript of the interview to refresh his recollection at the hearing, although he could have done so if necessary.

¶13 Fourth, we consider whether the true purpose of the offer of impeachment was for substantive rather than impeachment purposes. Based on the record, it hardly can be disputed that the state offered Almaraz's testimony for substantive use. In fact, the juvenile court acknowledged this in its ruling by stating "the case comes down to P[.]'s testimony in this matter."

[2]Counsel for Tyler mistakenly asserts that this factor applies to P.'s age or mental capacity.

¶14 We now consider the fifth and final *Allred* factor, whether the impeachment testimony is the only evidence of "guilt." Although primarily circumstantial, there was additional evidence of Tyler's responsibility. *See State v. Love*, 106 Ariz. 215, 216, 474 P.2d 806, 807 (1970) (conviction may be based solely on circumstantial evidence, if such evidence not only consistent with guilt but also inconsistent with every reasonable hypothesis of innocence); *see also State v. Jensen*, 106 Ariz. 421, 423, 477 P.2d 252, 254 (1970) (appellate court will not overturn verdict absent lack of substantial evidence; "[t]hat evidence may be circumstantial does not make it insubstantial"). It is undisputed that Tyler was at the McDonald's within a few hours of the incident; that he was displeased with J.'s directive to perform a task, his refusal of which resulted in his being suspended from his job; and that similar incidents of criminal damage in the shopping center were rare. Although the juvenile court commented that "the case comes down to P[.]'s testimony," this does not mean the court did not consider the circumstantial evidence. In any event, *Allred* "does not stand for the proposition . . . that when prior inconsistent statements are the sole basis of the state's case, they may not be permitted into evidence." *State v. Beck*, 151 Ariz. 130, 132, 726 P.2d 227, 229 (App. 1986).

¶15 Although two of the five *Allred* factors were present, specifically, that P. denied having made the impeaching statements and that the true purpose of the offer was substantive rather than impeaching, we nonetheless find that the risk of unfair prejudice did not outweigh the probative value of the impeaching statements. *See* Ariz. R. Evid. 403; *Allred*, 134 Ariz. at 277-78, 655 P.2d at 1329-30. Based on the court's remarks at the end of the adjudication hearing, it had considered carefully P.'s demeanor at the

hearing, in addition to having considered P.'s long-time friendship with Tyler, before finding beyond a reasonable doubt that Tyler was responsible for criminal damage. The record supports the court's implicit conclusion that P. was feigning inability to recall his prior statements, thus supporting the court's admission of those statements at the adjudication hearing. *See King*, 180 Ariz. at 275, 883 P.2d at 1031.

¶16 Because there was substantial, admissible evidence to support the juvenile court's order adjudicating Tyler delinquent, we affirm that order and the court's disposition order.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge